



STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

PAUL R. LEPAGE  
GOVERNOR

PATRICIA W. AHO  
COMMISSIONER

February 27, 2014

Curt Spalding, Regional Administrator  
EPA New England, Region 1  
5 Post Office Square - Suite 100  
Boston, MA 02109-3912

RE: Maine Water Quality Standards Docket 2013

Dear Mr. Spalding,

Enclosed are materials concerning changes to water quality standards administered by the Bureau of Land and Water Quality of the Maine Department of Environmental Protection (MDEP). These materials are provided for EPA's review as required by 33 U.S.C. § 1313(c). This packet includes:

- A list of recent changes to statutes and rules.
- A memo providing information concerning these changes.
- Copies of the chapters and rules described in this packet.
- Copies of other supporting documentation relating to these changes.
- A letter from Gerald D. Reid of the Maine Attorney General's Office certifying that the statutory changes affecting water quality standards were duly adopted pursuant to state law.

We look forward to EPA's timely review and action, pursuant to 40 CFR § 131.21, which provides in part that:

- (a) After the State submits its officially adopted revisions, the Regional Administrator shall either:
  - (1) Notify the State within 60 days that the revisions are approved, or
  - (2) Notify the State within 90 days that the revisions are disapproved. Such notification of disapproval shall specify the changes needed to assure compliance with the requirements of the Act and this regulation, and shall explain why the State standard is not in compliance with such requirements. Any new or revised State standard must be accompanied by some type of supporting analysis.

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In recent years, EPA's approval of new or revised water quality standards in Maine has included language to the effect that the approval "does not extend to waters that are within Indian territories and lands." Although it should not be necessary, by this letter I am expressly requesting that EPA approve the enclosed water quality standards as effective throughout the State of Maine without distinction as to waters within Indian territories or lands. There is no basis in the law for such a distinction, as Maine's environmental regulatory jurisdiction is uniform throughout the State, including as to lands and waters that EPA might consider to be Indian. *Maine v. Johnson*, 498 F.3d 37, 43 (1<sup>st</sup> Cir. 2007) (Maine Indian Land Claims Settlement Act, and particularly the Maine Implementing Act at 30 M.R.S. § 6204, is "about as explicit as is possible" in conferring environmental regulatory authority over Indian lands and waters on the State).

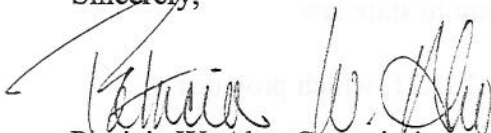
To the extent EPA does anything other than approve the enclosed standards in the unconditional manner requested, I hereby request that EPA:

- Identify with specificity each water body or segment thereof to which EPA contends the enclosed standards do not apply because they are waters "within Indian territories and lands"; and
- Explain with specificity what water quality standards, if any, EPA contends are applicable to such water bodies or segments thereof, and the legal basis for that conclusion.

As I am sure you can appreciate, if it is indeed EPA's position that Maine's duly adopted water quality standards do not apply to some subset of waters within the State, then both MDEP and Maine's regulated community are entitled to clear answers to these questions from your agency.

Thank you for your assistance in this matter. Please contact Mark Margerum (207-287-7842) if you have any questions or concerns as soon as is reasonably possible.

Sincerely,



Patricia W. Aho, Commissioner

cc: Mick Kuhns, Director, Bureau of Land and Water Quality;  
Brian Kavanah, Director, Division of Water Quality Management  
Don Witherill, Director, Division of Environmental Assessment  
Susanne Meidel, Water Quality Standards Coordinator, DEA  
Nancy Macirowski, Assistant Attorney General  
Gerald D. Reid, Assistant Attorney General, Chief, Natural Resources Division  
Ellen Weitzler, USEPA Region 1  
Ralph Abele, USEPA Region 1  
Dave Webster, USEPA Region 1



## List of Changes to Maine's Water Quality Standards

### 126<sup>th</sup> Maine Legislature, First Legislative Session (2013) Statutory Changes

**P.L. 2013, Ch. 193 (LD 1430). An Act to Clarify the Permitted Use of Aquatic Pesticides**  
Effective October 9, 2013.

Description: Chapter 193 allows the Department of Environmental Protection to issue permits for certain discharges of pesticides to Class AA, A, SA and GPA waters, tributaries of Class GPA waters and waters having a drainage area of less than 10 square miles where, with limited exceptions, discharges are currently prohibited. The discharges of pesticides that may be approved under this bill are discharges that are unintended and an incidental result of the spraying of pesticides, applied in compliance with federal labeling restrictions and applied in compliance with statute, Board of Pesticides Control rules and best management practices. Previously certain discharges of pesticides were exempt as long as the application of the pesticide was managed in accordance with the Federal Insecticide, Fungicide and Rodenticide Act. Due to a 2009 federal court decision, all such discharges of pesticides to waters of the United States are now required to obtain a National Pollutant Discharge Elimination System permit.

Public Hearing: Monday, May 6, 2013, 9:00 am, Cross Building Room 216

Work Session: Monday, May 13, 2013, 9:30 am, Cross Building Room 216

### 2013 Rulemaking

No rule revisions to Maine's water quality standards were adopted in 2013.

## **Memorandum Describing Recent Changes to Maine's Water Quality Standards**

### **126<sup>th</sup> Legislature, First Legislative Session (2013) Statutory Changes**

**P.L. 2013, Ch. 193 (LD 1430). An Act to Clarify the Permitted Use of Aquatic Pesticides**  
Effective October 9, 2013.

Chapter 193 makes changes to Title 38 MRSA sections 464, 465, 465-A and 465-B to allow the Department of Environmental Protection (Department) to issue permits for certain discharges of pesticides to Class AA, A, SA and GPA waters, tributaries of Class GPA waters and waters having a drainage area of less than 10 square miles. The discharges of pesticides that may be approved under the revised sections are discharges that are unintended and an incidental result of the spraying of pesticides applied in compliance with federal labeling restrictions and applied in compliance with statute, Board of Pesticides Control rules and best management practices.

Historically, under the United States Environmental Protection Agency's (EPA) interpretation of the CWA the discharge of pesticides regulated through the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) did not require a National Pollutant Discharge Elimination System (NPDES) permit. However, in 2009 a federal court rejected this interpretation, meaning that pesticide applications for mosquito and other flying insect pest control; weed and algae control; animal pest control; and forest canopy pest control above U.S. waters, or near these waters, must be regulated under the CWA because it may be unavoidable that pesticides will be deposited to these waters during application.

In response to the federal court ruling, EPA issued a General Permit in October 2011 as a model for state permit development. The Department plans to issue a General Permit based on EPA's model within the next several months. This permit will provide an approval mechanism for these unintended and incidental pesticide discharges. The Department could also approve of this type of discharge through an individual discharge permit. However, Maine statutes previously prohibited the Department from issuing a waste discharge permit for discharges, including pesticides, to the following water classifications and types: Class AA, A, SA, GPA, tributaries to GPA, and waters with a drainage area of less than 10 square miles. The statute allows limited exceptions for discharges to these waters, and Chapter 193 expands those limited exceptions to include discharges of pesticides that are approved by the Department and that are:

- Unintended and an incidental result of the spraying of pesticides;
- Applied in compliance with federal labeling restrictions; and
- Applied in compliance with Maine Board of Pesticide Control statutes, regulations, and best management practices.

Enclosed are the following exhibits relating to P.L. 2013, Ch. 193 (LD 1430), An Act to Clarify the Permitted Use of Aquatic Pesticides:

- Ex. 1 Marked up version of PL 2013, Chapter 193, as enacted by the Maine Legislature
- Ex. 2 Clean Copy of M.R.S.A. Title 38, Section 464
- Ex. 3 Clean Copy of M.R.S.A. Title 38, Section 465
- Ex. 4 Clean Copy of M.R.S.A. Title 38, Section 465-A
- Ex. 5 Clean Copy of M.R.S.A. Title 38, Section 465-B
- Ex. 6 Public Comments submitted at legislative hearing
- Ex. 7 Certification by the Maine Attorney General's Office that the law was duly adopted pursuant to state law



APPROVED

JUNE 4, 2013

BY GOVERNOR

CHAPTER

193

PUBLIC LAW

STATE OF MAINE

IN THE YEAR OF OUR LORD

TWO THOUSAND AND THIRTEEN

S.P. 516 - L.D. 1430

EXHIBIT

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1

An Act To Clarify the Permitted Use of Aquatic Pesticides

Be it enacted by the People of the State of Maine as follows:

**Sec. 1.** 38 MRSA §464, sub-§4, ¶A, as amended by PL 2007, c. 291, §1, is further amended to read:

A. Notwithstanding section 414-A, the department may not issue a water discharge license for any of the following discharges:

(1) Direct discharge of pollutants to waters having a drainage area of less than 10 square miles, except that:

(a) Discharges into these waters that were licensed prior to January 1, 1986 are allowed to continue only until practical alternatives exist;

(b) Storm water discharges in compliance with state and local requirements are exempt from this subparagraph;

(c) Aquatic pesticide or chemical discharges approved by the department and conducted by the department, the Department of Inland Fisheries and Wildlife or an agent of either agency for the purpose of restoring biological communities affected by an invasive species are exempt from this subparagraph;

(d) Chemical discharges for the purpose of restoring water quality in GPA waters approved by the department are exempt from this subparagraph; ~~and~~

(e) Discharges of aquatic pesticides approved by the department for the control of mosquito-borne diseases in the interest of public health and safety using materials and methods that provide for protection of nontarget species are exempt from this subparagraph. When the department issues a license for the discharge of aquatic pesticides authorized under this division, the department shall notify the municipality in which the application is licensed to occur and post the notice on the department's publicly accessible website; and

(f) Discharges of pesticides approved by the department are exempt from this subparagraph that are:

- (i) Unintended and an incidental result of the spraying of pesticides;
- (ii) Applied in compliance with federal labeling restrictions; and
- (iii) Applied in compliance with statute, Board of Pesticides Control rules and best management practices.

(2) New direct discharge of domestic pollutants to tributaries of Class-GPA waters;

(3) Any discharge into a tributary of GPA waters that by itself or in combination with other activities causes water quality degradation that would impair the characteristics and designated uses of downstream GPA waters or causes an increase in the trophic state of those GPA waters except for aquatic pesticide or chemical discharges approved by the department and conducted by the department, the Department of Inland Fisheries and Wildlife or an agent of either agency for the purpose of restoring biological communities affected by an invasive species in the GPA waters or a tributary to the GPA waters; the following:

(a) Aquatic pesticide or chemical discharges approved by the department and conducted by the department, the Department of Inland Fisheries and Wildlife or an agent of either agency for the purpose of restoring biological communities affected by an invasive species in the GPA waters or a tributary to the GPA waters; or

(b) Discharges of pesticides approved by the department that are:

- (i) Unintended and an incidental result of the spraying of pesticides;
- (ii) Applied in compliance with federal labeling restrictions; and
- (iii) Applied in compliance with statute, Board of Pesticides Control rules and best management practices.

(4) Discharge of pollutants to waters of the State that imparts color, taste, turbidity, toxicity, radioactivity or other properties that cause those waters to be unsuitable for the designated uses and characteristics ascribed to their class;

(5) Discharge of pollutants to any water of the State that violates sections 465, 465-A and 465-B, except as provided in section 451; causes the "pH" of fresh waters to fall outside of the 6.0 to 8.5 range; or causes the "pH" of estuarine and marine waters to fall outside of the 7.0 to 8.5 range;

(6) New discharges of domestic pollutants to the surface waters of the State that are not conveyed and treated in municipal or quasi-municipal sewage facilities. For the purposes of this subparagraph, "new discharge" means any overboard discharge that was not licensed as of June 1, 1987, except discharges from vessels and those discharges that were in continuous existence for the 12 months preceding June 1, 1987, as demonstrated by the applicant to the department with clear and convincing evidence. The volume of the discharge from an overboard



discharge facility that was licensed as of June 1, 1987 is determined by the actual or estimated volume from the facilities connected to the overboard discharge facility during the 12 months preceding June 1, 1987 or the volume allowed by the previous license, whichever is less, unless it is found by the department that an error was made during prior licensing. The months during which a discharge may occur from an overboard discharge facility that was licensed as of June 1, 1987 must be determined by the actual use of the facility at the time of the most recent license application prior to June 1, 1987 or the actual use of the facility during the 12 months prior to June 1, 1987, whichever is greater. If the overboard discharge facility was the primary residence of an owner at the time of the most recent license application prior to June 1, 1987 or during the 12 months prior to June 1, 1987, then the facility is considered a year-round residence. "Year-round residence" means a facility that is continuously used for more than 8 months of the year. For purposes of licensing, the department shall treat an increase in the licensed volume or quantity of an existing discharge or an expansion in the months during which the discharge takes place as a new discharge of domestic pollutants;

(7) After the Administrator of the United States Environmental Protection Agency ceases issuing permits for discharges of pollutants to waters of this State pursuant to the administrator's authority under the Federal Water Pollution Control Act, Section 402(c)(1), any proposed license to which the administrator has formally objected under 40 Code of Federal Regulations, Section 123.44, as amended, or any license that would not provide for compliance with applicable requirements of that Act or regulations adopted thereunder;

(8) Discharges for which the imposition of conditions can not ensure compliance with applicable water quality requirements of this State or another state;

(9) Discharges that would, in the judgment of the Secretary of the United States Army, substantially impair anchorage or navigation;

(10) Discharges that would be inconsistent with a plan or plan amendment approved under the Federal Water Pollution Control Act, Section 208(b); and

(11) Discharges that would cause unreasonable degradation of marine waters or when insufficient information exists to make a reasonable judgment whether the discharge would cause unreasonable degradation of marine waters.

Notwithstanding subparagraph (6), the department may issue a wastewater discharge license allowing for an increase in the volume or quantity of discharges of domestic pollutants from any university, college or school administrative unit sewage facility, as long as the university, college or school administrative unit has a wastewater discharge license valid on the effective date of this paragraph and the increase in discharges does not violate the conditions of subparagraphs (1) to (5) and (7) to (11) or other applicable laws.

**Sec. 2. 38 MRSA §465, sub-§1, ¶C, as amended by PL 2007, c. 291, §2, is further amended to read:**

C. Except as provided in this paragraph, there may be no direct discharge of pollutants to Class AA waters.

(1) Storm water discharges that are in compliance with state and local requirements are allowed.

(2) A discharge to Class AA waters that are or once were populated by a distinct population segment of Atlantic salmon as determined pursuant to the United States Endangered Species Act of 1973, Public Law 93-205, as amended, is allowed if, in addition to satisfying all the requirements of this article, the applicant, prior to issuance of a discharge license, objectively demonstrates to the department's satisfaction that the discharge is necessary, that there are no other reasonable alternatives available and that the discharged effluent is for the purpose of and will assist in the restoration of Atlantic salmon and will return the waters to a state that is closer to historically natural chemical quality.

(a) The department may issue no more than a total of 3 discharge licenses pursuant to this subparagraph and subsection 2, paragraph C, subparagraph (2).

(b) A discharge license issued pursuant to this subparagraph may not be effective for more than 5 years from the date of issuance.

(3) Aquatic pesticide or chemical discharges approved by the department and conducted by the department, the Department of Inland Fisheries and Wildlife or an agent of either agency for the purpose of restoring biological communities affected by an invasive species are allowed.

(4) Discharges of aquatic pesticides approved by the department for the control of mosquito-borne diseases in the interest of public health and safety using materials and methods that provide for protection of nontarget species are allowed. When the department issues a license for the discharge of aquatic pesticides authorized under this subparagraph, the department shall notify the municipality in which the application is licensed to occur and post the notice on the department's publicly accessible website.

(5) Discharges of pesticides approved by the department are allowed that are:

(a) Unintended and an incidental result of the spraying of pesticides;

(b) Applied in compliance with federal labeling restrictions; and

(c) Applied in compliance with statute, Board of Pesticides Control rules and best management practices.

**Sec. 3. 38 MRSA §465, sub-§2, ¶C**, as amended by PL 2007, c. 291, §3, is further amended to read:

C. Except as provided in this paragraph, direct discharges to these waters licensed after January 1, 1986 are permitted only if, in addition to satisfying all the requirements of this article, the discharged effluent will be equal to or better than the existing water quality of the receiving waters. Prior to issuing a discharge license, the department shall require the applicant to objectively demonstrate to the



department's satisfaction that the discharge is necessary and that there are no other reasonable alternatives available. Discharges into waters of this classification licensed prior to January 1, 1986 are allowed to continue only until practical alternatives exist.

(1) This paragraph does not apply to a discharge of storm water that is in compliance with state and local requirements.

(2) This paragraph does not apply to a discharge to Class A waters that are or once were populated by a distinct population segment of Atlantic salmon as determined pursuant to the United States Endangered Species Act of 1973, Public Law 93-205, as amended, if, in addition to satisfying all the requirements of this article, the applicant, prior to issuance of a discharge license, objectively demonstrates to the department's satisfaction that the discharge is necessary, that there are no other reasonable alternatives available and that the discharged effluent is for the purpose of and will assist in the restoration of Atlantic salmon and will return the waters to a state that is closer to historically natural chemical quality.

(a) The department may issue no more than a total of 3 discharge licenses pursuant to this subparagraph and subsection 1, paragraph C, subparagraph (2).

(b) A discharge license issued pursuant to this subparagraph may not be effective for more than 5 years from the date of issuance.

(3) This paragraph does not apply to aquatic pesticide or chemical discharges approved by the department and conducted by the department, the Department of Inland Fisheries and Wildlife or an agent of either agency for the purpose of restoring biological communities affected by an invasive species.

(4) For the purpose of allowing the discharge of aquatic pesticides approved by the department for the control of mosquito-borne diseases in the interest of public health and safety, the department may find that the discharged effluent will be equal to or better than the existing water quality of the receiving waters as long as the materials and methods used provide protection for nontarget species. When the department issues a license for the discharge of aquatic pesticides authorized under this subparagraph, the department shall notify the municipality in which the application is licensed to occur and post the notice on the department's publicly accessible website.

(5) This paragraph does not apply to discharges of pesticides approved by the department that are:

(a) Unintended and an incidental result of the spraying of pesticides;

(b) Applied in compliance with federal labeling restrictions; and

(c) Applied in compliance with statute, Board of Pesticides Control rules and best management practices.

**Sec. 4. 38 MRSA §465-A, sub-§1, ¶C, as amended by PL 2007, c. 291, §5, is further amended to read:**

C. There may be no new direct discharge of pollutants into Class GPA waters. The following are exempt from this provision:

- (1) Chemical discharges for the purpose of restoring water quality approved by the department;
- (2) Aquatic pesticide or chemical discharges approved by the department and conducted by the department, the Department of Inland Fisheries and Wildlife or an agent of either agency for the purpose of restoring biological communities affected by an invasive species;
- (3) Storm water discharges that are in compliance with state and local requirements; ~~and~~
- (4) Discharges of aquatic pesticides approved by the department for the control of mosquito-borne diseases in the interest of public health and safety using materials and methods that provide for protection of nontarget species. When the department issues a license for the discharge of aquatic pesticides authorized under this subparagraph, the department shall notify the municipality in which the application is licensed to occur and post the notice on the department's publicly accessible website; and
- (5) Discharges of pesticides approved by the department that are:
  - (a) Unintended and an incidental result of the spraying of pesticides;
  - (b) Applied in compliance with federal labeling restrictions; and
  - (c) Applied in compliance with statute, Board of Pesticides Control rules and best management practices.

Discharges into these waters licensed prior to January 1, 1986 are allowed to continue only until practical alternatives exist. Materials may not be placed on or removed from the shores or banks of a Class GPA water body in such a manner that materials may fall or be washed into the water or that contaminated drainage may flow or leach into those waters, except as permitted pursuant to section 480-C. A change of land use in the watershed of a Class GPA water body may not, by itself or in combination with other activities, cause water quality degradation that impairs the characteristics and designated uses of downstream GPA waters or causes an increase in the trophic state of those GPA waters.

**Sec. 5. 38 MRSA §465-B, sub-§1, ¶C,** as amended by PL 2009, c. 654, §7, is further amended to read:

C. There may be no direct discharge of pollutants to Class SA waters, except for the following:

- (1) Storm water discharges that are in compliance with state and local requirements;
- (2) Discharges of aquatic pesticides approved by the department for the control of mosquito-borne diseases in the interest of public health and safety using materials and methods that provide for protection of nontarget species. When the department issues a license for the discharge of aquatic pesticides authorized



under this subparagraph, the department shall notify the municipality in which the application is licensed to occur and post the notice on the department's publicly accessible website; ~~and~~

(3) An overboard discharge licensed prior to January 1, 1986 if no practicable alternative exists; and

(4) Discharges of pesticides approved by the department that are:

(a) Unintended and an incidental result of the spraying of pesticides;

(b) Applied in compliance with federal labeling restrictions; and

(c) Applied in compliance with statute, Board of Pesticides Control rules and best management practices.

## Maine Revised Statutes

## Title 38: WATERS AND NAVIGATION

## Chapter 3: PROTECTION AND IMPROVEMENT OF WATERS

**§464. CLASSIFICATION OF MAINE WATERS**

The waters of the State shall be classified in accordance with this article. [1985, c. 698, §15 (NEW) .]

**1. Findings; objectives; purpose.** The Legislature finds that the proper management of the State's water resources is of great public interest and concern to the State in promoting the general welfare; in preventing disease; in promoting health; in providing habitat for fish, shellfish and wildlife; as a source of recreational opportunity; and as a resource for commerce and industry.

The Legislature declares that it is the State's objective to restore and maintain the chemical, physical and biological integrity of the State's waters and to preserve certain pristine state waters. The Legislature further declares that in order to achieve this objective the State's goals are:

A. That the discharge of pollutants into the waters of the State be eliminated where appropriate; [1985, c. 698, §15 (NEW) .]

B. That no pollutants be discharged into any waters of the State without first being given the degree of treatment necessary to allow those waters to attain their classification; and [1985, c. 698, §15 (NEW) .]

C. That water quality be sufficient to provide for the protection and propagation of fish, shellfish and wildlife and provide for recreation in and on the water. [1985, c. 698, §15 (NEW) .]

The Legislature intends by passage of this article to establish a water quality classification system which will allow the State to manage its surface waters so as to protect the quality of those waters and, where water quality standards are not being achieved, to enhance water quality. This classification system shall be based on water quality standards which designate the uses and related characteristics of those uses for each class of water and which also establish water quality criteria necessary to protect those uses and related characteristics. The Legislature further intends by passage of this article to assign to each of the State's surface water bodies the water quality classification which shall designate the minimum level of quality which the Legislature intends for the body of water. This designation is intended to direct the State's management of that water body in order to achieve at least that minimum level of water quality.

[ 1985, c. 698, §15 (NEW) .]

**2. Procedures for reclassification.** Reclassification of state waters shall be governed by the following provisions.

A. Upon petition by any person or on its own motion, the board may initiate, following public notice, and the commissioner shall conduct classification studies and investigations. Information collected during these studies and investigations must be made available to the public in an expeditious manner. After consultation with other state agencies and, where appropriate, individuals, citizen groups, industries, municipalities and federal and interstate water pollution control agencies, the board may propose changes in water classification. [1989, c. 890, Pt. A, §40 (AFF); 1989, c. 890, Pt. B, §54 (AMD) .]

B. The board shall hold public hearings in the affected area, or reasonably adjacent to the affected area, for the purposes of presenting to all interested persons the proposed classification for each particular water body and obtaining public input. [1989, c. 890, Pt. A, §40 (AFF); 1989, c. 890, Pt. B, §54 (AMD) .]



C. The board may recommend changes in classification it deems necessary to the Legislature. [1985, c. 698, §15 (NEW).]

D. The Legislature shall have sole authority to make any changes in the classification of the waters of the State. [1985, c. 698, §15 (NEW).]

[ 1989, c. 890, Pt. A, §40 (AFF); 1989, c. 890, Pt. B, §54 (AMD) .]

**2-A. Removal of designated uses; creation of subcategories of designated uses.** Removal of designated uses and creation of subcategories of designated uses are governed by the provisions of this subsection and 40 Code of Federal Regulations, Part 131, as amended.

A. The board must conduct a use attainability analysis:

(1) Prior to proposing to the Legislature a designated use of a specific water body that does not include the uses specified in the Federal Water Pollution Control Act, Public Law 92-500, Section 101(a)(2), as amended; or

(2) Prior to proposing to the Legislature the removal of a designated use or the adoption of a subcategory of such a designated use that requires less stringent criteria. [1993, c. 344, §1 (NEW) .]

B. The board may not recommend to the Legislature the removal of a designated use or the establishment of a subcategory of the use, if:

(1) It is an existing use as defined in section 464, subsection 4, paragraph F, subparagraph (1), unless another designated use is adopted requiring more stringent criteria;

(2) The use can be attained by implementing effluent limits required under the Federal Water Pollution Control Act, Public Law 92-500, Sections 301(b) and 306, as amended and by implementing cost-effective and reasonable best management practices for nonpoint source control;

(3) The water body in question is currently attaining the designated use; or

(4) Adoption of the recommendation allows the introduction of a new discharge or the expansion of an existing discharge into the water body in question that is not attaining the designated use. [1993, c. 344, §1 (NEW) .]

C. The board may adopt any recommendation under this subsection only after holding a public hearing in the affected area or adjacent to the affected area. Conduct of the public hearing and the board's subsequent decision are governed by Title 5, chapter 375, subchapter IV. [1993, c. 344, §1 (NEW) .]

D. A finding by the board that attainment of a designated use is not feasible must be supported by a demonstration that the conditions of 40 Code of Federal Regulations 131.10(g) are met. [1993, c. 344, §1 (NEW) .]

E. If the board adopts a proposal to enact a designated use under paragraph A, subparagraph (1) or to remove a designated use or adopt a subcategory of a designated use under paragraph A, subparagraph (2), it shall forward that proposal to the joint standing committee of the Legislature having jurisdiction over natural resources matters at the next regular session of the Legislature. The board may not forward any other recommendation to the Legislature under this subsection. The Legislature has sole authority to make changes in the designated uses of the waters of the State, including the creation of a subcategory of a designated use. [1993, c. 344, §1 (NEW) .]

F. For the purposes of this subsection, "designated use" means the use specified in water quality standards for each water body or segment under sections 465 to 465-C and sections 467 to 470 whether or not that use is being attained. A designated use includes its associated habitat characteristic under sections 465 to 465-C. [1993, c. 344, §1 (NEW) .]

[ 1993, c. 344, §1 (NEW) .]

**2-B. Temporary removal of designated uses; use attainability analysis and creation of subcategory of uses for combined sewer overflows.** When designated uses are not being met as a result of combined sewer overflow discharges, the board may, consistent with this subsection and 40 Code of Federal Regulations, Part 131, temporarily remove designated uses that are not existing uses and create a temporary combined sewer overflow subcategory referred to as a CSO subcategory. Notwithstanding this subsection, it remains the goal of the State to fully maintain and restore water quality and eliminate or control combined sewer overflows as soon as practicable.

A. The board may create temporary CSO subcategories in classes B, C and SB and SC waters only when, due to the age, condition and design of an existing sewer system, technical or financial limitations prevent the timely attainment of all designated uses. In a CSO subcategory, uses are suspended only in the smallest area possible, for the shortest duration practicable and include only those designated uses and areas determined by the board to have the least potential for public benefit. [1995, c. 284, §1 (NEW) .]

B. Notwithstanding subsections 2 and 2-A, CSO subcategories may be created by the board upon application by a municipality or quasi-municipality having licensed combined sewer overflow discharges, if the following standards are met.

(1) The applicant submits to the department for approval, with or without conditions, a study and plan, including an implementation schedule, for combined sewer overflow abatement, referred to as the CSO plan. In order for the board to create a CSO subcategory, the CSO plan must:

- (a) Place high priority on abatement of combined sewer overflows that affect waters having the greatest potential for public use or benefit and plan to relocate any remaining discharges to areas where minimal impacts or losses of uses would occur; and
- (b) Provide for the implementation as soon as practical of technology-based control methods to achieve best practicable treatment or ensure that cost-effective best management practices are being implemented.

(2) The board finds that attainment of a designated use is not feasible and such determination must be supported by demonstration that the conditions of 40 Code of Federal Regulations, Part 131.10(g) are met.

(3) The board finds that the uses to be affected are not existing uses as defined in subsection 4, paragraph F, subparagraph (1).

(4) The board finds that discharges from combined sewer overflows are not affecting uses that, in the board's judgment, constitute high value or important resources. In determining if a resource is high value or important the board shall consider its economic, recreational and ecological significance, the likelihood that removal of a combined sewer overflow will lead to utilization of that resource and the effects of other discharges or conditions on that resource. [1995, c. 284, §1 (NEW) .]

C. Prior to creating any CSO subcategory, the board shall adopt rules regarding required studies, best practicable treatment, abatement options and related issues for combined sewer overflows. CSO subcategories may be created only after completion of the following.

(1) Either during or following development of combined sewer abatement plans, licensees shall conduct public hearings in the area that would be affected by a CSO subcategory. Notices and records of hearings must be kept and included as part of an application made to the board.

(2) Combined sewer overflow abatement plans must be submitted to the department for technical review and approval.

(3) Licensees proposing CSO subcategories shall submit formal applications to the board. Information in the application must include: description of the areas and uses to be affected, the time and duration of effects, comments received at public hearings, a description of continuing efforts to abate impacts and proposals for periodic review and update of abatement plans.



(4) The board shall provide public notice of applications for CSO subcategories and solicit public comments. The board shall also consult with agencies, public officials and other persons identified as having interest in the area to be affected. Based on the results of public hearings held by the applicant, the comments received and the nature of the application, the board may hold a public hearing.

(5) The board may approve, approve with conditions or deny applications for CSO subcategories. In cases when a water body is affected by combined sewer overflows from more than one licensee, the board shall, to the maximum extent possible, consider regional impacts and seek to establish common goals and uses for those waters.

(6) In a manner prescribed by the board, applicants receiving approval of CSO subcategories shall provide notice to the public in the area affected, describing the limitations on use of the water body. [1995, c. 284, §1 (NEW) .]

D. Upon creation of a CSO subcategory and removal of a designated use, the board may temporarily suspend or modify water quality criteria associated with that use as appropriate, but only to the extent and duration that those criteria are affected by the licensee for whom the assignment is made. Action by the board under this subsection does not relieve other discharge sources from any requirement to provide necessary treatment or best management practices or to comply with water quality criteria. [1995, c. 284, §1 (NEW) .]

E. Either independently or in conjunction with the requirements of subsection 3 and upon renewal of individual waste discharge licenses, the department shall periodically review all CSO subcategories. Reviews of CSO subcategories must take into consideration water quality criteria and uses, combined sewer overflow abatement technology, monitoring data, financial information and regulatory requirements affecting CSO subcategories. [1995, c. 284, §1 (NEW) .]

Upon petition by the department or any person or on its own motion, the board may, at its discretion, and following notice and opportunity for hearing, revise or revoke a CSO subcategory when it finds any change in the conditions under which the existing designation was made. The failure to comply with the measures specified in an approved combined sewer overflow abatement plan is cause for revocation of a CSO subcategory.

[ 1995, c. 284, §1 (NEW) .]

**3. Reports to the Legislature.** The department shall periodically report to the Legislature as governed by the following provisions.

A. The commissioner shall submit to the first regular session of each Legislature a report on the quality of the State's waters which describes existing water quality, identifies waters that are not attaining their classification and states what measures are necessary for the attainment of the standards of their classification. [1989, c. 890, Pt. A, §40 (AFF); 1989, c. 890, Pt. B, §55 (AMD) .]

B. The board shall, from time to time, but at least once every 3 years, hold public hearings for the purpose of reviewing the water quality classification system and related standards and, as appropriate, recommending changes in the standards to the Legislature. [2003, c. 551, §6 (AMD) .]

C. The commissioner shall report annually to each regular session of the Legislature on the status of licensed discharges. [1989, c. 890, Pt. A, §40 (AFF); 1989, c. 890, Pt. B, §55 (AMD) .]

[ 2003, c. 551, §6 (AMD) .]

**4. General provisions.** The classification system for surface waters established by this article shall be subject to the following provisions.

A. Notwithstanding section 414-A, the department may not issue a water discharge license for any of the following discharges:

- (1) Direct discharge of pollutants to waters having a drainage area of less than 10 square miles, except that:
  - (a) Discharges into these waters that were licensed prior to January 1, 1986 are allowed to continue only until practical alternatives exist;
  - (b) Storm water discharges in compliance with state and local requirements are exempt from this subparagraph;
  - (c) Aquatic pesticide or chemical discharges approved by the department and conducted by the department, the Department of Inland Fisheries and Wildlife or an agent of either agency for the purpose of restoring biological communities affected by an invasive species are exempt from this subparagraph;
  - (d) Chemical discharges for the purpose of restoring water quality in GPA waters approved by the department are exempt from this subparagraph;
  - (e) Discharges of aquatic pesticides approved by the department for the control of mosquito-borne diseases in the interest of public health and safety using materials and methods that provide for protection of nontarget species are exempt from this subparagraph. When the department issues a license for the discharge of aquatic pesticides authorized under this division, the department shall notify the municipality in which the application is licensed to occur and post the notice on the department's publicly accessible website; and
  - (f) Discharges of pesticides approved by the department are exempt from this subparagraph that are:
    - (i) Unintended and an incidental result of the spraying of pesticides;
    - (ii) Applied in compliance with federal labeling restrictions; and
    - (iii) Applied in compliance with statute, Board of Pesticides Control rules and best management practices.
- (2) New direct discharge of domestic pollutants to tributaries of Class-GPA waters;
- (3) Any discharge into a tributary of GPA waters that by itself or in combination with other activities causes water quality degradation that would impair the characteristics and designated uses of downstream GPA waters or causes an increase in the trophic state of those GPA waters except for the following:
  - (a) Aquatic pesticide or chemical discharges approved by the department and conducted by the department, the Department of Inland Fisheries and Wildlife or an agent of either agency for the purpose of restoring biological communities affected by an invasive species in the GPA waters or a tributary to the GPA waters; or
  - (b) Discharges of pesticides approved by the department that are:
    - (i) Unintended and an incidental result of the spraying of pesticides;
    - (ii) Applied in compliance with federal labeling restrictions; and
    - (iii) Applied in compliance with statute, Board of Pesticides Control rules and best management practices.
- (4) Discharge of pollutants to waters of the State that imparts color, taste, turbidity, toxicity, radioactivity or other properties that cause those waters to be unsuitable for the designated uses and characteristics ascribed to their class;
- (5) Discharge of pollutants to any water of the State that violates sections 465, 465-A and 465-B, except as provided in section 451; causes the "pH" of fresh waters to fall outside of the 6.0 to 8.5 range; or causes the "pH" of estuarine and marine waters to fall outside of the 7.0 to 8.5 range;



(6) New discharges of domestic pollutants to the surface waters of the State that are not conveyed and treated in municipal or quasi-municipal sewage facilities. For the purposes of this subparagraph, "new discharge" means any overboard discharge that was not licensed as of June 1, 1987, except discharges from vessels and those discharges that were in continuous existence for the 12 months preceding June 1, 1987, as demonstrated by the applicant to the department with clear and convincing evidence. The volume of the discharge from an overboard discharge facility that was licensed as of June 1, 1987 is determined by the actual or estimated volume from the facilities connected to the overboard discharge facility during the 12 months preceding June 1, 1987 or the volume allowed by the previous license, whichever is less, unless it is found by the department that an error was made during prior licensing. The months during which a discharge may occur from an overboard discharge facility that was licensed as of June 1, 1987 must be determined by the actual use of the facility at the time of the most recent license application prior to June 1, 1987 or the actual use of the facility during the 12 months prior to June 1, 1987, whichever is greater. If the overboard discharge facility was the primary residence of an owner at the time of the most recent license application prior to June 1, 1987 or during the 12 months prior to June 1, 1987, then the facility is considered a year-round residence. "Year-round residence" means a facility that is continuously used for more than 8 months of the year. For purposes of licensing, the department shall treat an increase in the licensed volume or quantity of an existing discharge or an expansion in the months during which the discharge takes place as a new discharge of domestic pollutants;

(7) After the Administrator of the United States Environmental Protection Agency ceases issuing permits for discharges of pollutants to waters of this State pursuant to the administrator's authority under the Federal Water Pollution Control Act, Section 402(c)(1), any proposed license to which the administrator has formally objected under 40 Code of Federal Regulations, Section 123.44, as amended, or any license that would not provide for compliance with applicable requirements of that Act or regulations adopted thereunder;

(8) Discharges for which the imposition of conditions can not ensure compliance with applicable water quality requirements of this State or another state;

(9) Discharges that would, in the judgment of the Secretary of the United States Army, substantially impair anchorage or navigation;

(10) Discharges that would be inconsistent with a plan or plan amendment approved under the Federal Water Pollution Control Act, Section 208(b); and

(11) Discharges that would cause unreasonable degradation of marine waters or when insufficient information exists to make a reasonable judgment whether the discharge would cause unreasonable degradation of marine waters.

Notwithstanding subparagraph (6), the department may issue a wastewater discharge license allowing for an increase in the volume or quantity of discharges of domestic pollutants from any university, college or school administrative unit sewage facility, as long as the university, college or school administrative unit has a wastewater discharge license valid on the effective date of this paragraph and the increase in discharges does not violate the conditions of subparagraphs (1) to (5) and (7) to (11) or other applicable laws. [2013, c. 193, §1 (AMD).]

B. All surface waters of the State shall be free of settled substances which alter the physical or chemical nature of bottom material and of floating substances, except as naturally occur, which impair the characteristics and designated uses ascribed to their class. [1985, c. 698, §15 (NEW).]

C. Where natural conditions, including, but not limited to, marshes, bogs and abnormal concentrations of wildlife cause the dissolved oxygen or other water quality criteria to fall below the minimum standards specified in sections 465, 465-A and 465-B, those waters shall not be considered to be failing to attain their classification because of those natural conditions. [1985, c. 698, §15 (NEW).]

D. Except as otherwise provided in this paragraph, for the purpose of computing whether a discharge will violate the classification of any river or stream, the assimilative capacity of the river or stream must be computed using the minimum 7-day low flow which can be expected to occur with a frequency of



once in 10 years. The department may use a different flow rate only for those toxic substances regulated under section 420. To use a different flow rate, the department must find that the flow rate is consistent with the risk being addressed. [1991, c. 159, (AMD).]

E. The waters contained in excavations approved by the department for wastewater treatment purposes are unclassified waters. [1989, c. 890, Pt. A, §40 (AFF); 1989, c. 890, Pt. B, §57 (AMD).]

F. The antidegradation policy of the State is governed by the following provisions.

(1) Existing in-stream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected. Existing in-stream water uses are those uses which have actually occurred on or after November 28, 1975, in or on a water body whether or not the uses are included in the standard for classification of the particular water body.

Determinations of what constitutes an existing in-stream water use on a particular water body must be made on a case-by-case basis by the department. In making its determination of uses to be protected and maintained, the department shall consider designated uses for that water body and:

- (a) Aquatic, estuarine and marine life present in the water body;
- (b) Wildlife that utilize the water body;
- (c) Habitat, including significant wetlands, within a water body supporting existing populations of wildlife or aquatic, estuarine or marine life, or plant life that is maintained by the water body;
- (d) The use of the water body for recreation in or on the water, fishing, water supply, or commercial activity that depends directly on the preservation of an existing level of water quality. Use of the water body to receive or transport waste water discharges is not considered an existing use for purposes of this antidegradation policy; and
- (e) Any other evidence that, for divisions (a), (b) and (c), demonstrates their ecological significance because of their role or importance in the functioning of the ecosystem or their rarity and, for division (d), demonstrates its historical or social significance.

(1-A) The department may only issue a waste discharge license pursuant to section 414-A, or approve a water quality certification pursuant to the United States Clean Water Act, Section 401, Public Law 92-500, as amended, when the department finds that:

(a) The existing in-stream use involves use of the water body by a population of plant life, wildlife, or aquatic, estuarine or marine life, or as aquatic, estuarine, marine, wildlife, or plant habitat, and the applicant has demonstrated that the proposed activity would not have a significant impact on the existing use. For purpose of this division, significant impact means:

(i) Impairing the viability of the existing population, including significant impairment to growth and reproduction or an alteration of the habitat which impairs viability of the existing population; or

(b) The existing in-stream use involves use of the water body for recreation in or on the water, fishing, water supply or commercial enterprises that depend directly on the preservation of an existing level of water quality and the applicant has demonstrated that the proposed activity would not result in significant degradation of the existing use.

The department shall determine what constitutes a population of a particular species based upon the degree of geographic and reproductive isolation from other individuals of the same species.

If the department fails to find that the conditions of this subparagraph are met, water quality certification, pursuant to the United States Clean Water Act, Section 401, Public Law 92-500, as amended, is denied.



(2) Where high quality waters of the State constitute an outstanding national resource, that water quality must be maintained and protected. For purposes of this paragraph, the following waters are considered outstanding national resources: those water bodies in national and state parks and wildlife refuges; public reserved lands; and those water bodies classified as Class AA and SA waters pursuant to section 465, subsection 1; section 465-B, subsection 1; and listed under sections 467, 468 and 469.

(3) The department may only issue a discharge license pursuant to section 414-A or approve water quality certification pursuant to the Federal Water Pollution Control Act, Section 401, Public Law 92-500, as amended, if the standards of classification of the water body and the requirements of this paragraph are met. The department may issue a discharge license or approve water quality certification for a project affecting a water body in which the standards of classification are not met if the project does not cause or contribute to the failure of the water body to meet the standards of classification.

(4) When the actual quality of any classified water exceeds the minimum standards of the next highest classification, that higher water quality must be maintained and protected. The board shall recommend to the Legislature that that water be reclassified in the next higher classification.

(5) The department may only issue a discharge license pursuant to section 414-A or approve water quality certification pursuant to the United States Clean Water Act, Section 401, Public Law 92-500, as amended, which would result in lowering the existing quality of any water body after making a finding, following opportunity for public participation, that the action is necessary to achieve important economic or social benefits to the State and when the action is in conformance with subparagraph (3). That finding must be made following procedures established by rule of the board. [1991, c. 66, Pt. B, §1 (AMD).]

H. A hydropower project, as defined by section 632, constructed after the effective date of this paragraph may cause some change to the habitat and aquatic life of the project's impoundment and the waters immediately downstream of and measurably affected by the project, so long as the habitat and aquatic life criteria of those waters' classification under sections 465, 465-A, 467, and 468 are met. This paragraph does not constitute any change in the criteria for habitat and aquatic life under sections 465 and 465-A. [1991, c. 813, Pt. D, §1 (NEW).]

J. For the purpose of calculating waste discharge license limits for toxic substances, the department may use any unallocated assimilative capacity that the department has set aside for future growth if the use of that unallocated assimilative capacity would avoid an exceedance of applicable ambient water quality criteria or a determination by the department of a reasonable potential to exceed applicable ambient water quality criteria. [2011, c. 194, §3 (NEW).]

K. Unless otherwise required by an applicable effluent limitation guideline adopted by the department, any limitations for metals in a waste discharge license may be expressed only as mass-based limits. [2011, c. 194, §3 (NEW).]

[ 2013, c. 193, §1 (AMD) .]

**5. Rulemaking.** In accordance with the Maine Administrative Procedure Act, the board shall promulgate rules necessary to implement the water quality classification system established by this article. In promulgating rules, the board shall solicit and consider, in addition to any other materials, information on the economic and environmental impact of those rules.

Rules shall be promulgated by January 1, 1987, and as necessary thereafter, and shall include, but are not limited to, sampling and analytical methods, protocols and procedures for satisfying the water quality criteria, including evaluation of the impact of any discharge on the resident biological community.

Rules adopted pursuant to this subsection shall become effective upon adoption. Rules adopted pursuant to this subsection shall be submitted to the joint standing committee of the Legislature having jurisdiction over natural resources for review during the next regular session of the Legislature following adoption. This committee may submit legislation it deems necessary to clarify legislative intent regarding rules adopted pursuant to this subsection. If the committee takes no action, the rules shall continue in effect.

[ 1985, c. 698, §15 (NEW) .]

**6. Implementation of biological water quality criteria.** The implementation of water quality criteria pertaining to the protection of the resident biological community shall be governed by the provisions of this subsection.

A. At any time during the term of a valid wastewater discharge license that was issued prior to the effective date of this article, the board may modify that license in accordance with section 341-D, subsection 3 if the discharger is not in compliance with the water quality criteria pertaining to the protection of the resident biological community. When a discharge license is modified under this subsection, the board shall establish a reasonable schedule to bring the discharge into compliance with the water quality criteria pertaining to the protection of the resident biological community. [1991, c. 66, Pt. A, §43 (AFF); 1991, c. 66, Pt. A, §13 (RPR) .]

B. When a discharge license is issued after the effective date of this article and before the effective date of the rules adopted pursuant to subsection 5, the department shall establish a reasonable schedule to bring the discharge into compliance with the water quality criteria pertaining to the protection of the resident biological community. [1989, c. 890, Pt. A, §40 (AFF); 1989, c. 890, Pt. B, §59 (AMD) .]

C. A discharger seeking a new discharge license following the effective date of the rules adopted under subsection 5 shall comply with the water quality criteria of this article. [1985, c. 698, §15 (NEW) .]

[ 1991, c. 66, Pt. A, §13 (AMD); 1991, c. 66, Pt. A, §43 (AFF) .]

**7. Interdepartmental coordination.** The commissioner, the Commissioner of Marine Resources and the Commissioner of Health and Human Services shall jointly:

A. Make available accurate and consistent information on the requirements of this section, section 411-A and section 414-A, subsection 1-B; and [1989, c. 442, §6 (NEW) .]

B. Certify wastewater treatment and disposal technologies which can be used to replace overboard discharges. [1989, c. 890, Pt. A, §40 (AFF); 1989, c. 890, Pt. B, §60 (AMD) .]

[ 1989, c. 890, Pt. A, §40 (AFF); 1989, c. 890, Pt. B, §60 (AMD); 2003, c. 689, Pt. B, §7 (REV) .]

**8. Development of group systems.** Subject to the provisions of section 414-A, subsection 1-B, the commissioner shall coordinate the development and implementation of wastewater treatment and disposal systems serving more than one residence or commercial establishment when individual replacement systems are not feasible.

[ 1989, c. 890, Pt. A, §40 (AFF); 1989, c. 890, Pt. B, §60 (AMD) .]

**9. Existing hydropower impoundments managed as great ponds; habitat and aquatic life criteria.**

[ 2005, c. 159, §1 (RP) .]



**9-A. Existing hydropower impoundments managed as great ponds; habitat and aquatic life criteria.** The following provisions govern habitat and aquatic life criteria for existing hydropower impoundments managed as great ponds.

A. For the purposes of water quality certification under the Federal Water Pollution Control Act, Public Law 92-500, Section 401, as amended, and licensing of modifications under section 636, the hydropower project located on the water body referenced in section 467, subsection 7, paragraph C, subparagraph (1), division (b-1), is deemed to have met the habitat characteristics and aquatic life criteria in the existing impoundment if:

- (1) The project is in existence on June 30, 1992;
- (2) The project creates an impoundment that remains classified under section 465-A after June 30, 1992;
- (3) The project creates an impoundment that is subject to water level fluctuations that have an effect on the habitat and aquatic life in the littoral zone so that the habitat and aquatic life differ significantly from that found in an unimpounded great pond; and
- (4) The existing impounded waters are able to support all species of fish indigenous to those waters and the structure and function of the resident biological community in the impounded waters is maintained. [2005, c. 159, §2 (NEW).]

B. For the purposes of water quality certification under the Federal Water Pollution Control Act, Public Law 92-500, Section 401, as amended, and licensing of modifications under section 636, Ragged Lake, located in the Penobscot River, West Branch drainage, is deemed to have met the habitat characteristics and aquatic life criteria in the existing impoundment if that habitat and aquatic life satisfy the aquatic life criteria contained in section 465, subsection 4, paragraph C, except that habitat and aquatic life in the portions of the water body affected by annual drawdowns of up to 20 feet may reflect the effects of such drawdowns, based on a use attainability analysis conducted by the board pursuant to subsection 2-A. [2005, c. 159, §2 (NEW).]

C. For the purposes of water quality certification under the Federal Water Pollution Control Act, Public Law 92-500, Section 401, as amended, and licensing of modifications under section 636, Seboomook Lake, located in the Penobscot River, West Branch drainage, is deemed to have met the habitat characteristics and aquatic life criteria in the existing impoundment if that habitat and aquatic life satisfy the aquatic life criteria contained in section 465, subsection 4, paragraph C, except that habitat and aquatic life in the portions of the water body affected by annual drawdowns of up to 17 feet may reflect the effects of such drawdowns, based on a use attainability analysis conducted by the board pursuant to subsection 2-A. [2005, c. 159, §2 (NEW).]

D. Other than those described in paragraphs A, B and C, all hydropower projects with impoundments in existence on June 30, 1992 that remain classified under section 465-A after June 30, 1992 and that do not attain the habitat and aquatic life criteria of that section must, at a minimum, satisfy the aquatic life criteria contained in section 465, subsection 4, paragraph C. [2005, c. 159, §2 (NEW).]

E. When the actual water quality of the impounded waters attains any more stringent characteristic or criteria of those waters' classification under section 465-A, that water quality must be maintained and protected. [2005, c. 159, §2 (NEW).]

[ 2005, c. 159, §2 (NEW) .]

**10. Existing hydropower impoundments managed under riverine classifications; habitat and aquatic life criteria.** For the purposes of water quality certification under the Federal Water Pollution Control Act, Public Law 92-500, section 401, as amended, and the licensing of modifications under section 636, hydropower projects in existence on the effective date of this subsection, the impoundments of which are classified under section 465, are subject to the provisions of this subsection in recognition of some changes to aquatic life and habitat that have occurred due to the existing impoundments of these projects.

A. Except as provided in paragraphs B and D, the habitat characteristics and aquatic life criteria of Classes A and B are deemed to be met in the existing impoundments classified A or B of those projects if:

- (1) The impounded waters achieve the aquatic life criteria of section 465, subsection 4, paragraph C. [1991, c. 813, Pt. B, §1 (NEW) .]

B. The habitat characteristics and aquatic life criteria of Classes A and B are not deemed to be met in the existing impoundments of those projects referred to in paragraph A if:

- (1) Reasonable changes can be implemented that do not significantly affect existing energy generation capability; and
- (2) Those changes would result in improvement in the habitat and aquatic life of the impounded waters.

If the conditions described in subparagraphs (1) and (2) occur, those changes must be implemented and the resulting improvement in habitat and aquatic life must be achieved and maintained. [1991, c. 813, Pt. B, §1 (NEW) .]

C. If the conditions described in paragraph B, subparagraphs (1) and (2) occur at a project in existence on the effective date of this subsection, the impoundment of which is classified C, the changes described in paragraph B, subparagraphs (1) and (2) must be implemented and the resulting improvement in habitat and aquatic life must be achieved and maintained. [1991, c. 813, Pt. B, §1 (NEW) .]

D. When the actual water quality of waters affected by this subsection attains any more stringent characteristic or criteria of those waters' classification under sections 465, 467 and 468, that water quality must be maintained and protected. [1991, c. 813, Pt. B, §1 (NEW) .]

[ 1991, c. 813, Pt. B, §1 (NEW) .]

**11. Downstream stretches affected by existing hydropower projects.** Hydropower projects in existence on the effective date of this subsection that are located on water bodies referenced in section 467, subsection 4, paragraph A, subparagraphs (1) and (7), and section 467, subsection 12, paragraph A, subparagraphs (7) and (9) are subject to the provisions of this subsection.

For the purposes of water quality certification of hydropower projects under the Federal Water Pollution Control Act, Public Law 92-500, Section 401, as amended, and licensing of modifications to these hydropower projects under section 636, the habitat characteristics and aquatic life criteria of Class A are deemed to be met in the waters immediately downstream of and measurably affected by the projects listed in this subsection if the criteria contained in section 465, subsection 4, paragraph C are met.

[ 1993, c. 1, §114 (COR) .]

**12. Discharges from certain fish hatcheries.** An unlicensed discharge from a fish hatchery is considered, and continues to be considered after it is licensed pursuant to section 413, the same as a discharge licensed prior to January 1, 1986 for the purposes of subsection 4, paragraph A, subparagraph (1); section 465, subsection 2, paragraph C; and section 465-A, subsection 1, paragraph C if the following conditions are met:

- A. The discharge was in existence prior to January 1, 1986; [1999, c. 720, §1 (NEW) .]
- B. The fish hatchery is licensed to cultivate fish by the Department of Inland Fisheries and Wildlife on the effective date of this subsection; and [1999, c. 720, §1 (NEW) .]
- C. An application from the hatchery for a waste discharge license is accepted as complete for processing by the Department of Environmental Protection within 90 days of notification that a waste discharge license is required pursuant to section 413. [1999, c. 720, §1 (NEW) .]



The Department of Environmental Protection shall notify a fish hatchery with an unlicensed discharge that a waste discharge license is required pursuant to section 413 within 90 days of the effective date of this subsection or within 90 days of finding the unlicensed discharge.

[ 1999, c. 720, §1 (NEW) .]

**13. Measurement of dissolved oxygen in riverine impoundments.** Compliance with dissolved oxygen criteria in existing riverine impoundments must be measured as follows.

A. Compliance with dissolved oxygen criteria may not be measured within 0.5 meters of the bottom of existing riverine impoundments. [2003, c. 257, §1 (NEW) .]

B. Where mixing is inhibited due to thermal stratification in an existing riverine impoundment, compliance with numeric dissolved oxygen criteria may not be measured below the higher of:

- (1) The point of thermal stratification when such stratification occurs; or
- (2) The point proposed by the department as an alternative depth for a specific riverine impoundment based on all factors included in section 466, subsection 11-A and for which a use attainability analysis is conducted if required by the United States Environmental Protection Agency.

For purposes of this paragraph, "thermal stratification" means a change of temperature of at least one degree Celsius per meter of depth, causing water below this point in an impoundment to become isolated and not mix with water above this point in the impoundment. [2003, c. 257, §1 (NEW) .]

C. Where mixing is inhibited due to natural topographical features in an existing riverine impoundment, compliance with numeric dissolved oxygen criteria may not be measured within that portion of the impoundment that is topographically isolated. Such natural topographic features may include, but not be limited to, natural deep holes or river bottom sills. [2003, c. 257, §1 (NEW) .]

Notwithstanding the provisions of this subsection, dissolved oxygen concentrations in existing riverine impoundments must be sufficient to support existing and designated uses of these waters. For purposes of this subsection, "existing riverine impoundments" means all impoundments of rivers and streams in existence as of January 1, 2001 and not otherwise classified as GPA.

[ 2003, c. 257, §1 (NEW) .]

#### SECTION HISTORY

. 1985, c. 698, §15 (NEW). 1987, c. 180, §§4,5 (AMD). 1987, c. 419, §10 (AMD). 1987, c. 567, (AMD). 1989, c. 309, §2 (AMD). 1989, c. 442, §§4-6 (AMD). 1989, c. 764, §1 (AMD). 1989, c. 856, §§6,7 (AMD). 1989, c. 878, §B40 (AMD). 1989, c. 890, §§A40,B54-60 (AMD). 1991, c. 66, §§A12,13,B1 (AMD). 1991, c. 66, §A43 (AFF). 1991, c. 159, (AMD). 1991, c. 813, §§A1,B1,C1, D1 (AMD). RR 1993, c. 1, §§113,114 (COR). 1993, c. 40, §1 (AMD). 1993, c. 344, §§1,2 (AMD). 1995, c. 284, §1 (AMD). 1995, c. 312, §1 (AMD). 1997, c. 794, §A30 (AMD). 1999, c. 720, §1 (AMD). 2003, c. 245, §7 (AMD). 2003, c. 246, §14 (AMD). 2003, c. 257, §1 (AMD). 2003, c. 318, §2 (AMD). 2003, c. 551, §6 (AMD). 2003, c. 650, §3 (AMD). 2003, c. 689, §B7 (REV). 2005, c. 159, §§1,2 (AMD). 2005, c. 182, §1 (AMD). 2007, c. 291, §1 (AMD). 2011, c. 194, §3 (AMD). 2013, c. 193, §1 (AMD).

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## Maine Revised Statutes

## Title 38: WATERS AND NAVIGATION

## Chapter 3: PROTECTION AND IMPROVEMENT OF WATERS

**§465. STANDARDS FOR CLASSIFICATION OF FRESH SURFACE WATERS**

The department shall have 4 standards for the classification of fresh surface waters which are not classified as great ponds. [1989, c. 890, Pt. A, §40 (AFF); 1989, c. 890, Pt. B, §61 (AMD).]

1. **Class AA waters.** Class AA shall be the highest classification and shall be applied to waters which are outstanding natural resources and which should be preserved because of their ecological, social, scenic or recreational importance.

A. Class AA waters must be of such quality that they are suitable for the designated uses of drinking water after disinfection, fishing, agriculture, recreation in and on the water, navigation and as habitat for fish and other aquatic life. The habitat must be characterized as free-flowing and natural. [2003, c. 227, §1 (AMD); 2003, c. 227, §9 (AFF); 2005, c. 561, §10 (AFF).]

B. The aquatic life, dissolved oxygen and bacteria content of Class AA waters shall be as naturally occurs. [1985, c. 698, §15 (NEW).]

C. Except as provided in this paragraph, there may be no direct discharge of pollutants to Class AA waters.

(1) Storm water discharges that are in compliance with state and local requirements are allowed.

(2) A discharge to Class AA waters that are or once were populated by a distinct population segment of Atlantic salmon as determined pursuant to the United States Endangered Species Act of 1973, Public Law 93-205, as amended, is allowed if, in addition to satisfying all the requirements of this article, the applicant, prior to issuance of a discharge license, objectively demonstrates to the department's satisfaction that the discharge is necessary, that there are no other reasonable alternatives available and that the discharged effluent is for the purpose of and will assist in the restoration of Atlantic salmon and will return the waters to a state that is closer to historically natural chemical quality.

(a) The department may issue no more than a total of 3 discharge licenses pursuant to this subparagraph and subsection 2, paragraph C, subparagraph (2).

(b) A discharge license issued pursuant to this subparagraph may not be effective for more than 5 years from the date of issuance.

(3) Aquatic pesticide or chemical discharges approved by the department and conducted by the department, the Department of Inland Fisheries and Wildlife or an agent of either agency for the purpose of restoring biological communities affected by an invasive species are allowed.

(4) Discharges of aquatic pesticides approved by the department for the control of mosquito-borne diseases in the interest of public health and safety using materials and methods that provide for protection of nontarget species are allowed. When the department issues a license for the discharge of aquatic pesticides authorized under this subparagraph, the department shall notify the municipality in which the application is licensed to occur and post the notice on the department's publicly accessible website.

(5) Discharges of pesticides approved by the department are allowed that are:

(a) Unintended and an incidental result of the spraying of pesticides;

(b) Applied in compliance with federal labeling restrictions; and

(c) Applied in compliance with statute, Board of Pesticides Control rules and best management practices. [2013, c. 193, §2 (AMD) .]

[ 2013, c. 193, §2 (AMD) .]

**2. Class A waters.** Class A shall be the 2nd highest classification.

A. Class A waters must be of such quality that they are suitable for the designated uses of drinking water after disinfection; fishing; agriculture; recreation in and on the water; industrial process and cooling water supply; hydroelectric power generation, except as prohibited under Title 12, section 403; navigation; and as habitat for fish and other aquatic life. The habitat must be characterized as natural. [2003, c. 227, §2 (AMD); 2003, c. 227, §9 (AFF); 2005, c. 561, §10 (AFF) .]

B. The dissolved oxygen content of Class A waters shall be not less than 7 parts per million or 75% of saturation, whichever is higher. The aquatic life and bacteria content of Class A waters shall be as naturally occurs. [1985, c. 698, §15 (NEW) .]

C. Except as provided in this paragraph, direct discharges to these waters licensed after January 1, 1986 are permitted only if, in addition to satisfying all the requirements of this article, the discharged effluent will be equal to or better than the existing water quality of the receiving waters. Prior to issuing a discharge license, the department shall require the applicant to objectively demonstrate to the department's satisfaction that the discharge is necessary and that there are no other reasonable alternatives available. Discharges into waters of this classification licensed prior to January 1, 1986 are allowed to continue only until practical alternatives exist.

(1) This paragraph does not apply to a discharge of storm water that is in compliance with state and local requirements.

(2) This paragraph does not apply to a discharge to Class A waters that are or once were populated by a distinct population segment of Atlantic salmon as determined pursuant to the United States Endangered Species Act of 1973, Public Law 93-205, as amended, if, in addition to satisfying all the requirements of this article, the applicant, prior to issuance of a discharge license, objectively demonstrates to the department's satisfaction that the discharge is necessary, that there are no other reasonable alternatives available and that the discharged effluent is for the purpose of and will assist in the restoration of Atlantic salmon and will return the waters to a state that is closer to historically natural chemical quality.

(a) The department may issue no more than a total of 3 discharge licenses pursuant to this subparagraph and subsection 1, paragraph C, subparagraph (2).

(b) A discharge license issued pursuant to this subparagraph may not be effective for more than 5 years from the date of issuance.

(3) This paragraph does not apply to aquatic pesticide or chemical discharges approved by the department and conducted by the department, the Department of Inland Fisheries and Wildlife or an agent of either agency for the purpose of restoring biological communities affected by an invasive species.

(4) For the purpose of allowing the discharge of aquatic pesticides approved by the department for the control of mosquito-borne diseases in the interest of public health and safety, the department may find that the discharged effluent will be equal to or better than the existing water quality of the receiving waters as long as the materials and methods used provide protection for nontarget species. When the department issues a license for the discharge of aquatic pesticides authorized under this subparagraph, the department shall notify the municipality in which the application is licensed to occur and post the notice on the department's publicly accessible website.

(5) This paragraph does not apply to discharges of pesticides approved by the department that are:

(a) Unintended and an incidental result of the spraying of pesticides;



(b) Applied in compliance with federal labeling restrictions; and

(c) Applied in compliance with statute, Board of Pesticides Control rules and best management practices. [2013, c. 193, §3 (AMD) .]

D. Storm water discharges to Class A waters must be in compliance with state and local requirements. [2003, c. 318, §4 (NEW) .]

E. Material may not be deposited on the banks of Class A waters in any manner that makes transfer of pollutants into the waters likely. [2003, c. 318, §4 (NEW) .]

[ 2013, c. 193, §3 (AMD) .]

**3. Class B waters.** Class B shall be the 3rd highest classification.

A. Class B waters must be of such quality that they are suitable for the designated uses of drinking water supply after treatment; fishing; agriculture; recreation in and on the water; industrial process and cooling water supply; hydroelectric power generation, except as prohibited under Title 12, section 403; navigation; and as habitat for fish and other aquatic life. The habitat must be characterized as unimpaired. [2003, c. 227, §3 (AMD); 2003, c. 227, §9 (AFF); 2005, c. 561, §10 (AFF) .]

B. The dissolved oxygen content of Class B waters may not be less than 7 parts per million or 75% of saturation, whichever is higher, except that for the period from October 1st to May 14th, in order to ensure spawning and egg incubation of indigenous fish species, the 7-day mean dissolved oxygen concentration may not be less than 9.5 parts per million and the 1-day minimum dissolved oxygen concentration may not be less than 8.0 parts per million in identified fish spawning areas. Between May 15th and September 30th, the number of *Escherichia coli* bacteria of human and domestic animal origin in these waters may not exceed a geometric mean of 64 per 100 milliliters or an instantaneous level of 236 per 100 milliliters. In determining human and domestic animal origin, the department shall assess licensed and unlicensed sources using available diagnostic procedures. [2005, c. 409, §1 (AMD) .]

C. Discharges to Class B waters may not cause adverse impact to aquatic life in that the receiving waters must be of sufficient quality to support all aquatic species indigenous to the receiving water without detrimental changes in the resident biological community.

(1) This paragraph does not apply to aquatic pesticide or chemical discharges approved by the department and conducted by the department, the Department of Inland Fisheries and Wildlife or an agent of either agency for the purpose of restoring biological communities affected by an invasive species.

(2) For the purpose of allowing the discharge of aquatic pesticides approved by the department for the control of mosquito-borne diseases in the interest of public health and safety, the department may find that the discharged effluent will not cause adverse impact to aquatic life as long as the materials and methods used provide protection for nontarget species. When the department issues a license for the discharge of aquatic pesticides authorized under this subparagraph, the department shall notify the municipality in which the application is licensed to occur and post the notice on the department's publicly accessible website. [2007, c. 291, §4 (AMD) .]

[ 2007, c. 291, §4 (AMD) .]

**4. Class C waters.** Class C shall be the 4th highest classification.

A. Class C waters must be of such quality that they are suitable for the designated uses of drinking water supply after treatment; fishing; agriculture; recreation in and on the water; industrial process and cooling water supply; hydroelectric power generation, except as prohibited under Title 12, section 403; navigation; and as a habitat for fish and other aquatic life. [2003, c. 227, §4 (AMD); 2003, c. 227, §9 (AFF); 2005, c. 561, §10 (AFF) .]

B. The dissolved oxygen content of Class C water may be not less than 5 parts per million or 60% of saturation, whichever is higher, except that in identified salmonid spawning areas where water quality is sufficient to ensure spawning, egg incubation and survival of early life stages, that water quality sufficient for these purposes must be maintained. In order to provide additional protection for the growth of indigenous fish, the following standards apply.

(1) The 30-day average dissolved oxygen criterion of a Class C water is 6.5 parts per million using a temperature of 22 degrees centigrade or the ambient temperature of the water body, whichever is less, if:

(a) A license or water quality certificate other than a general permit was issued prior to March 16, 2004 for the Class C water and was not based on a 6.5 parts per million 30-day average dissolved oxygen criterion; or

(b) A discharge or a hydropower project was in existence on March 16, 2005 and required but did not have a license or water quality certificate other than a general permit for the Class C water.

This criterion for the water body applies to licenses and water quality certificates issued on or after March 16, 2004.

(2) In Class C waters not governed by subparagraph (1), dissolved oxygen may not be less than 6.5 parts per million as a 30-day average based upon a temperature of 24 degrees centigrade or the ambient temperature of the water body, whichever is less. This criterion for the water body applies to licenses and water quality certificates issued on or after March 16, 2004.

The department may negotiate and enter into agreements with licensees and water quality certificate holders in order to provide further protection for the growth of indigenous fish. Agreements entered into under this paragraph are enforceable as department orders according to the provisions of sections 347-A to 349.

Between May 15th and September 30th, the number of *Escherichia coli* bacteria of human and domestic animal origin in Class C waters may not exceed a geometric mean of 126 per 100 milliliters or an instantaneous level of 236 per 100 milliliters. In determining human and domestic animal origin, the department shall assess licensed and unlicensed sources using available diagnostic procedures. The board shall adopt rules governing the procedure for designation of spawning areas. Those rules must include provision for periodic review of designated spawning areas and consultation with affected persons prior to designation of a stretch of water as a spawning area. [2005, c. 409, §2 (RPR).]

C. Discharges to Class C waters may cause some changes to aquatic life, except that the receiving waters must be of sufficient quality to support all species of fish indigenous to the receiving waters and maintain the structure and function of the resident biological community. This paragraph does not apply to aquatic pesticide or chemical discharges approved by the department and conducted by the department, the Department of Inland Fisheries and Wildlife or an agent of either agency for the purpose of restoring biological communities affected by an invasive species. [2005, c. 182, §5 (AMD).]

[ 2005, c. 182, §5 (AMD); 2005, c. 409, §2 (AMD); 2005, c. 561, §10 (AFF) .]

#### SECTION HISTORY

1985, c. 698, §15 (NEW). 1989, c. 890, §§A40,B61-63 (AMD). 1999, c. 243, §8 (AMD). 2003, c. 227, §§1-4 (AMD). 2003, c. 227, §9 (AFF). 2003, c. 318, §§3,4 (AMD). 2003, c. 574, §§1,2 (AMD). 2003, c. 664, §1 (AMD). 2005, c. 182, §§2-5 (AMD). 2005, c. 409, §§1,2 (AMD). 2005, c. 561, §10 (AFF). 2007, c. 291, §§2-4 (AMD). 2013, c. 193, §§2, 3 (AMD).



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## Maine Revised Statutes

## Title 38: WATERS AND NAVIGATION

## Chapter 3: PROTECTION AND IMPROVEMENT OF WATERS

**§465-A. STANDARDS FOR CLASSIFICATION OF LAKES AND PONDS**

The department shall have one standard for the classification of great ponds and natural lakes and ponds less than 10 acres in size. Impoundments of rivers that are defined as great ponds pursuant to section 480-B are classified as GPA or as specifically provided in sections 467 and 468. [1989, c. 890, Pt. A, §40 (AFF); 1989, c. 890, Pt. B, §64 (AMD).]

1. **Class GPA waters.** Class GPA shall be the sole classification of great ponds and natural ponds and lakes less than 10 acres in size.

A. Class GPA waters must be of such quality that they are suitable for the designated uses of drinking water after disinfection, recreation in and on the water, fishing, agriculture, industrial process and cooling water supply, hydroelectric power generation, navigation and as habitat for fish and other aquatic life. The habitat must be characterized as natural. [2003, c. 227, §5 (AMD); 2003, c. 227, §9 (AFF); 2005, c. 561, §10 (AFF).]

B. Class GPA waters must be described by their trophic state based on measures of the chlorophyll "a" content, Secchi disk transparency, total phosphorus content and other appropriate criteria. Class GPA waters must have a stable or decreasing trophic state, subject only to natural fluctuations and must be free of culturally induced algal blooms that impair their use and enjoyment. The number of *Escherichia coli* bacteria of human and domestic animal origin in these waters may not exceed a geometric mean of 29 per 100 milliliters or an instantaneous level of 194 per 100 milliliters. [2007, c. 292, §23 (AMD).]

C. There may be no new direct discharge of pollutants into Class GPA waters. The following are exempt from this provision:

- (1) Chemical discharges for the purpose of restoring water quality approved by the department;
- (2) Aquatic pesticide or chemical discharges approved by the department and conducted by the department, the Department of Inland Fisheries and Wildlife or an agent of either agency for the purpose of restoring biological communities affected by an invasive species;
- (3) Storm water discharges that are in compliance with state and local requirements;
- (4) Discharges of aquatic pesticides approved by the department for the control of mosquito-borne diseases in the interest of public health and safety using materials and methods that provide for protection of nontarget species. When the department issues a license for the discharge of aquatic pesticides authorized under this subparagraph, the department shall notify the municipality in which the application is licensed to occur and post the notice on the department's publicly accessible website; and
- (5) Discharges of pesticides approved by the department that are:
  - (a) Unintended and an incidental result of the spraying of pesticides;
  - (b) Applied in compliance with federal labeling restrictions; and
  - (c) Applied in compliance with statute, Board of Pesticides Control rules and best management practices.

Discharges into these waters licensed prior to January 1, 1986 are allowed to continue only until practical alternatives exist. Materials may not be placed on or removed from the shores or banks of a Class GPA water body in such a manner that materials may fall or be washed into the water or that contaminated drainage may flow or leach into those waters, except as permitted pursuant to section 480-C. A change



of land use in the watershed of a Class GPA water body may not, by itself or in combination with other activities, cause water quality degradation that impairs the characteristics and designated uses of downstream GPA waters or causes an increase in the trophic state of those GPA waters. [2013, c. 193, §4 (AMD).]

[ 2013, c. 193, §4 (AMD) .]

#### SECTION HISTORY

1985, c. 698, §15 (NEW). 1989, c. 890, §§A40,B64,65 (AMD). 1999, c. 243, §9 (AMD). 2003, c. 227, §5 (AMD). 2003, c. 227, §9 (AFF). 2005, c. 182, §6 (AMD). 2005, c. 561, §10 (AFF). 2007, c. 291, §5 (AMD). 2007, c. 292, §23 (AMD). 2013, c. 193, §4 (AMD).

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## Maine Revised Statutes

## Title 38: WATERS AND NAVIGATION

## Chapter 3: PROTECTION AND IMPROVEMENT OF WATERS

**§465-B. STANDARDS FOR CLASSIFICATION OF ESTUARINE AND MARINE WATERS**

The department shall have 3 standards for the classification of estuarine and marine waters. [1989, c. 890, Pt. A, §40 (AFF); 1989, c. 890, Pt. B, §66 (AMD).]

**1. Class SA waters.** Class SA shall be the highest classification and shall be applied to waters which are outstanding natural resources and which should be preserved because of their ecological, social, scenic, economic or recreational importance.

A. Class SA waters must be of such quality that they are suitable for the designated uses of recreation in and on the water, fishing, aquaculture, propagation and harvesting of shellfish, navigation and as habitat for fish and other estuarine and marine life. The habitat must be characterized as free-flowing and natural. [2003, c. 227, §6 (AMD).]

B. The estuarine and marine life, dissolved oxygen and bacteria content of Class SA waters shall be as naturally occurs. [1985, c. 698, §15 (NEW).]

C. There may be no direct discharge of pollutants to Class SA waters, except for the following:

- (1) Storm water discharges that are in compliance with state and local requirements;
- (2) Discharges of aquatic pesticides approved by the department for the control of mosquito-borne diseases in the interest of public health and safety using materials and methods that provide for protection of nontarget species. When the department issues a license for the discharge of aquatic pesticides authorized under this subparagraph, the department shall notify the municipality in which the application is licensed to occur and post the notice on the department's publicly accessible website;
- (3) An overboard discharge licensed prior to January 1, 1986 if no practicable alternative exists; and
- (4) Discharges of pesticides approved by the department that are:
  - (a) Unintended and an incidental result of the spraying of pesticides;
  - (b) Applied in compliance with federal labeling restrictions; and
  - (c) Applied in compliance with statute, Board of Pesticides Control rules and best management practices. [2013, c. 193, §5 (AMD).]

[ 2013, c. 193, §5 (AMD) .]

**2. Class SB waters.** Class SB waters shall be the 2nd highest classification.

A. Class SB waters must be of such quality that they are suitable for the designated uses of recreation in and on the water, fishing, aquaculture, propagation and harvesting of shellfish, industrial process and cooling water supply, hydroelectric power generation, navigation and as habitat for fish and other estuarine and marine life. The habitat must be characterized as unimpaired. [2003, c. 227, §7 (AMD).]

B. The dissolved oxygen content of Class SB waters must be not less than 85% of saturation. Between May 15th and September 30th, the numbers of enterococcus bacteria of human and domestic animal origin in these waters may not exceed a geometric mean of 8 per 100 milliliters or an instantaneous level of 54 per 100 milliliters. In determining human and domestic animal origin, the department shall assess licensed and unlicensed sources using available diagnostic procedures. The numbers of total coliform



bacteria or other specified indicator organisms in samples representative of the waters in shellfish harvesting areas may not exceed the criteria recommended under the National Shellfish Sanitation Program, United States Food and Drug Administration. [2005, c. 409, §3 (AMD).]

C. Discharges to Class SB waters may not cause adverse impact to estuarine and marine life in that the receiving waters must be of sufficient quality to support all estuarine and marine species indigenous to the receiving water without detrimental changes in the resident biological community. There may be no new discharge to Class SB waters that would cause closure of open shellfish areas by the Department of Marine Resources. For the purpose of allowing the discharge of aquatic pesticides approved by the department for the control of mosquito-borne diseases in the interest of public health and safety, the department may find that the discharged effluent will not cause adverse impact to estuarine and marine life as long as the materials and methods used provide protection for nontarget species. When the department issues a license for the discharge of aquatic pesticides authorized under this paragraph, the department shall notify the municipality in which the application is licensed to occur and post the notice on the department's publicly accessible website. [2007, c. 291, §7 (AMD).]

[ 2007, c. 291, §7 (AMD) .]

### 3. Class SC waters. Class SC waters shall be the 3rd highest classification.

A. Class SC waters must be of such quality that they are suitable for recreation in and on the water, fishing, aquaculture, propagation and restricted harvesting of shellfish, industrial process and cooling water supply, hydroelectric power generation, navigation and as a habitat for fish and other estuarine and marine life. [2003, c. 227, §8 (AMD).]

B. The dissolved oxygen content of Class SC waters must be not less than 70% of saturation. Between May 15th and September 30th, the numbers of enterococcus bacteria of human and domestic animal origin in these waters may not exceed a geometric mean of 14 per 100 milliliters or an instantaneous level of 94 per 100 milliliters. In determining human and domestic animal origin, the department shall assess licensed and unlicensed sources using available diagnostic procedures. The numbers of total coliform bacteria or other specified indicator organisms in samples representative of the waters in restricted shellfish harvesting areas may not exceed the criteria recommended under the National Shellfish Sanitation Program, United States Food and Drug Administration. [2005, c. 409, §4 (AMD) .]

C. Discharges to Class SC waters may cause some changes to estuarine and marine life provided that the receiving waters are of sufficient quality to support all species of fish indigenous to the receiving waters and maintain the structure and function of the resident biological community. [1985, c. 698, §15 (NEW) .]

[ 2005, c. 409, §4 (AMD) .]

#### SECTION HISTORY

1985, c. 698, §15 (NEW). 1989, c. 890, §§A40,B66 (AMD). 1999, c. 243, §10 (AMD). 2003, c. 227, §§6-8 (AMD). 2005, c. 409, §§3,4 (AMD). 2007, c. 291, §§6, 7 (AMD). 2009, c. 654, §7 (AMD). 2013, c. 193, §5 (AMD).

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PAUL R. LEPAGE  
GOVERNOR

STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

EXHIBIT

6



PATRICIA W. AHO  
COMMISSIONER

**TESTIMONY OF BRIAN KAVANAH, DIRECTOR,  
DIVISION OF WATER QUALITY MANAGEMENT  
MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**SPEAKING IN SUPPORT OF L.D. 1430**

**AN ACT TO CLARIFY THE PERMITTED USE OF AQUATIC PESTICIDES  
SPONSORED BY SENATOR SAVIELLO**

**BEFORE THE JOINT STANDING COMMITTEE  
ON ENVIRONMENT AND NATURAL RESOURCES**

**DATE OF HEARING: MAY 6, 2013**

Senator Boyle, Representative Welsh, and Members of the Committee, I am Brian Kavanah, Director of the Division of Water Quality Management with the Department of Environmental Protection, speaking in support of LD 1430.

The Department believes this bill is necessary due to a federal court case that resulted in recent changes to how discharges of pesticides are regulated under the Clean Water Act (CWA). Without this change to the law, it is possible that certain practices, such as insect pest control in Maine's forests, could not legally continue.

Historically, the United States Environmental Protection Agency's (EPA) interpretation of the CWA was that the discharge of pesticides regulated through the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) did not require a National Pollutant Discharge Elimination System (NPDES) permit. In recent years, a federal court case changed this interpretation such that the discharge of pesticides to waters of the United States must now be regulated under the NPDES program.

While there have been several bills in the United States Congress to clarify the original intent of the CWA so that NPDES permits would not be required, all of these efforts have apparently stalled. Consequently, the EPA and authorized states like Maine must now regulate discharges of pesticides to waters of the United States.

Under Maine law and regulation, the Department has regulated the discharge of aquatic pesticides to waters of the State. An aquatic pesticide is a substance discharged into the waters of the State to control something in the water. Examples of this include the use of aquatic herbicides to control invasive plants, the use piscicides to control invasive fish, and the use of biological pesticides for larval stage mosquito control.

The Maine Board of Pesticide Control has regulated terrestrial pesticide use, applicator training and certification.

Under this new interpretation by the court of the Clean Water Act, a NPDES permit is now required for pesticide applications for mosquito and other flying insect pest control; weed and algae control; animal pest control; and forest canopy pest control above U.S. waters, or near these waters, because it may be unavoidable that pesticides will be deposited to these waters during application. A NPDES permit is not required for pesticide applications that do not result in point source discharges to waters of the United States, so not all pesticide applications will need a permit. But for those that might need a permit, we want to make sure the state has a mechanism to allow the application to occur.

In response to the federal court ruling, EPA issued a General Permit in October 2011 as a model for state permit development. The Department plans to issue a General Permit based on EPA's model within the next several months. This permit will be used as the approval mechanism for certain pesticide discharges. We are working closely with the staff of the Maine Board of Pesticide Control throughout this process.



However, the Department is currently prohibited by statute from issuing a waste discharge permit for discharges, including pesticides, to the following water classifications and types: Class AA, A, SA, GPA, tributaries to GPA, and waters with a drainage area of less than 10 square miles. The statute allows limited exceptions for discharges to these waters, and this bill would expand those limited exceptions to include discharges of pesticides that are approved by the Department and that are:

- Unintended and an incidental result of the spraying of pesticides;
- Applied in compliance with federal labeling restrictions; and
- Applied in compliance with Maine Board of Pesticide Control statutes, regulations, and best management practices.

As I noted earlier, without this change to the law, it is possible that certain practices, such as insect pest control in Maine's forests could not legally continue.

I appreciate the opportunity to provide you with our comments and would be happy to answer any questions.



PAUL R. LePAGE  
GOVERNOR

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BOARD OF PESTICIDES CONTROL  
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HENRY JENNINGS, DIRECTOR, MAINE BOARD OF PESTICIDES CONTROL  
MAINE DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY

SPEAKING IN SUPPORT OF L.D. 1430

AN ACT TO CLARIFY THE PERMITTED USE OF AQUATIC PESTICIDES  
SPONSORED BY SENATOR SAVIELLO

BEFORE THE JOINT STANDING COMMITTEE  
ON ENVIRONMENT AND NATURAL RESOURCES

DATE OF HEARING: MAY 6, 2013

Senator Boyle, Representative Welsh, and Members of the Committee, my name is Henry Jennings and I am the Director for the Maine Board of Pesticides Control, speaking on behalf of the Board and the Department of Agriculture, Conservation and Forestry in strong support of LD 1430.

Congress established a comprehensive pesticide regulatory framework in 1972 when it amended the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) to focus on environmental and public health concerns. The amendments allowed for delegation of the federal pesticide regulatory program to the states. All fifty states subsequently established the necessary companion laws and infrastructure to administer a pesticide program under FIFRA, and FIFRA was the only federal statute with jurisdiction over pesticides for over thirty years.

In 2009, a Sixth Circuit Court of Appeals ruling established that the federal Clean Water Act (CWA) also has jurisdiction over pesticides, which resulted in a duplicative and bureaucratically burdensome federal regulatory system, and one that does not result in any meaningful public benefit.

Consequently, the federal Environmental Protection Agency (EPA) and virtually all of the states addressed the CWA conflict by developing a so-called General Pesticide Permits which establish that incidental and unintended discharges of pesticides to surface waters is not unlawful provided that pesticide applicators implement best practices intended to prevent pesticide transport. Across the country, this proved to be the best way to address the jurisdictional conflict, except in Maine.



In Maine, we place great value on our uniquely pristine surface waters, and Maine statutes reflect those values by prohibiting almost all discharges to our highest quality waters. There's sound reasoning behind these standards. However, the combination of Maine's unusually stringent statutes and the recent Sixth Circuit ruling are preventing Maine from implementing the nationally-agreed-upon, best resolution to the jurisdictional conflict created by the recent court ruling; a General Pesticide Permit.

We can all agree that preventing pesticides from reaching surface water is critically important, and a large percentage of the Board of Pesticides Control's efforts are aimed at accomplishing this goal. But requiring thousands of pesticide applicators to obtain Waste Discharge Licenses doesn't further that goal, it simply creates a new layer of burdensome bureaucracy with no meaningful environmental benefit.

The public interest is best served by enacting LD 1430 so that Maine's environmental agencies can focus their attention on preserving our unique resources instead of implementing meaningless bureaucracy. The Maine Board of Pesticides Control and the Department of Agriculture, Conservation and Forestry strongly endorse LD 1430. Please give the bill your favorable consideration.

That concludes my testimony. I'll be happy to answer any questions now or at the work session.



# Maine Forest Products Council

*Maine's woods are working*

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## Testimony in Support of LD 1430

### An Act To Clarify the Permitted Use of Aquatic Pesticides

Senator Boyle and Representative Welsh, and distinguished members of the Environment and Natural Resources Committee, my name is Patrick Strauch and I am the Executive Director of the Maine Forest Products Council (MFPC). We represent the broad spectrum of companies involved in the forest industry and over 9 million acres of commercial forestland in Maine.

This bill is intended to keep in place the existing regulatory system for pesticide applications at the Board of Pesticide Control (BPC), which administers both state and federal laws.

### USE OF PESTICIDES IN FORESTRY

About 2% (8,999 acres)<sup>1</sup> of the total harvested acres in Maine (444,339 acres) are treated with aerial applications of pesticides. Herbicide treatments are either *site preparation* for planting (1,701 acres) or *conifer release* (7,298 acres) and generally occur once in the rotation of a tree crop (every 70 years). Historically the use of herbicides has decreased, but the program remains a very important silvicultural tool.

Pending threats from the spruce budworm and other invasive insects and diseases makes aerial treatment a necessity. MFPC forest landowners are working with the Maine Forest Service and the Cooperative Forestry Research Unit at UMO to develop a treatment program for Spruce Budworm. Currently a budworm outbreak of 6 million acres is occurring in Quebec and our best estimate is that this will happen in Maine in 3-5 years. This bill will help clarify the law and preserve the use of this important tool for forest managers.

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<sup>1</sup> 2011 Maine Forest Service Silvicultural Activities Report



## WHY THIS BILL IS NEEDED

The reason this bill is needed is because a federal court recently overturned the longstanding US EPA rule that discharges of pesticide applications for silvicultural and agricultural purposes are not "point sources" that require a permit under the Clean Water Act.

Pesticide applications have been fully regulated for many years under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as well as state laws administered by the Board of Pesticide Control. Yet the EPA is now being compelled to add another permit under the Clean Water Act.

As Maine DEP administers the CWA in this state, we understand they intend to follow EPA guidance and adopt general permits for a range of discharges under its authority to administer the Clean Water Act in Maine. Our particular concern is a general permit for pesticide drift residue that unintentionally lands in the water even after using the procedures required by state and federal law, and best management practices.

However, current state law prohibits DEP from issuing discharge permits in certain waters, since federal law formerly did not require these permits for silvicultural pesticide applications. So this legislation is now needed in order for DEP to issue permits for these discharges in compliance with the Clean Water Act.

We agree with the approach in the bill to use the federal and state laws administered by BPC instead of having duplicative rules at the DEP. The BPC rules are well developed and effective, and the BPC has the expertise to make necessary changes.

We have some concern with the requirement in law to use "best management practices" because there is variation and discretion in these practices, which can lead to differences in their application. To maintain predictability in the law, we suggest adopting specific practices into the BPC rules as needed.

We appreciate the committee's attention to this issue, and urge you to support LD 1430.

JANET T. MILLS  
ATTORNEY GENERAL



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Re: Water Quality Legislation

Dear Ann:

I have been asked by the MEDEP to review certain amendments to Maine statutes in order to certify changes to Maine's water quality standards. As required by 40 CFR § 131.6(e), I certify that the following statutory amendments were duly adopted pursuant to State law.

#### 2013 Legislative Session

- P.L. 2013, c. 193 (LD 1430). An Act to Clarify the Permitted Use of Aquatic Pesticides." This law became effective October 9, 2013.

The Attorney General joins in the request of MEDEP Commissioner Aho that EPA approve the new and amended water quality standards unconditionally, and without distinction as to Indian waters. *See Maine v. Johnson*, 498 F.3d 37, 43 (1<sup>st</sup> Cir. 2007). To the extent EPA does anything other than unconditionally approve the enclosed standards as effective throughout the State, we also ask that EPA provide a specific explanation of the legal basis for the refusal to grant that unconditional approval. To the extent it is EPA's position that Maine's duly adopted water quality standards do not apply to waters within Indian Territory, please explain EPA's position as to what standards are currently applicable to such waters. EPA's failure to explain its position on these issues in recent years has complicated the job of those responsible for implementing the Clean Water Act in Maine, and the job of those responsible for complying with it as well. It has generally created confusion where there should be none.

Pursuant to 40 CFR § 131.21, we look forward to EPA's review and approval. If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

Gerald D. Reid  
Assistant Attorney General  
Chief, Natural Resources Division

Enclosure

